IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.563 OF 2006

Rajesh P.Galinde ....Petitioner
V/s.
Jejuri Nagarparishad & Anr. ....Respondents

Mr.L.D. Vakil i/b M/s.Ram & Co. for the Petitioner.
Mr.A.R.S. Baxi for Respondent No.1.

CORAM : R.M. SAVANT, J.
DATED : 7TH JUNE, 2007.

P.C. :

1. This Petition impugns the order dated 5.8.2005 passed on Exhibit 41 filed by the Petitioner in R.C.S. No.97 of 2001. By the said order, the Petitioner's application for appointment of the Court Commissioner by invoking order 26 Rule 9 of the C.P.C., has been rejected.

2. Such of the facts which are necessary to be cited are stated thus :-

. The Petitioner has filed suit bearing R.C.S. No.97 of 2001 for declaration that the notice dated 29.5.2001 issued by Respondent No.1 - Jejuri Nagarparishad for removal of the alleged unauthorised construction on CTS No.115 is illegal and for a

further relief restraining Respondent No.1 for demolishing the shed of the Petitioner, which is the subject matter of the said suit. It is the case of the Petitioner that adjoining property CTS No.114 and the structure thereon being Municipal House No.89 belongs to the joint family of the Petitioner and his brothers. In the North-East corner of the said property, there is a shed of about 400 sq.ft. where the Petitioner is running a licensed country liquor shop and some portion of the shed is in CTS No.114 and that a portion of CTS No.115 is overlapping on CTS No.114 since the shape of the land CTS No.115 is triangular.

3. In the said suit, the Petitioner filed an application Exhibit 5 for temporary injunction against Respondent No.1 - Municipal Council. The trial Court passed the order of status-quo. The said application was directed to be heard along with the suit by the trial Court vide its order dated 13.7.2001. Since the suit structure is partly situated on CTS No.114, which is owned by the Petitioner and since on account of the peculiar circumstances of land CTS No.114 overlapping on CTS No.115, the Petitioner made an application which is Exhibit 41 for appointment of the Court Commissioner to ascertain the exact location of the

shed with reference to the aforesaid CTS numbers and to ascertain the position of the structure which is overlapping.

4. Respondent No.1 - Municipal Council opposed the said application on the ground that the Petitioner had admitted in the plaint that the suit structure is on CTS No.115 and therefore, there is no question of ascertainment of the location of the structure by the Court Commissioner. The trial Court relying upon the averments made in paragraph 3 of the plaint, rejected the said application by holding that the Petitioner has admitted in the said suit that the structure is on CTS No.115. The trial Court therefore vide its impugned order, dismissed the said application.

5. I have heard the learned counsel for the parties. Mr.Soni, the learned counsel appearing on behalf of the Petitioner states that in view of the peculiar circumstances, wherein said CTS Nos.114 and 115 are overlapping, the Court Commissioner is required to be appointed to give report to the Court as regards the exact location of the shed qua the said CTS Nos.114 and 115. Mr.Soni further contends that the interpretation put by the trial Court on said paragraph 3 is misconceived. Mr.Soni submits that in

terms the Petitioner has stated in the plaint that the shed is on both CTS Nos.114 and 115 and therefore, the exact overlapping is to be ascertained. In any event Mr.Soni contends that no prejudice will be caused to Respondent No.1 - Municipal Council. The Court can direct the concerned Surveyor/Engineer to carry out a survey and submit report to the Court. On behalf of Respondent No.1, it is contended that the Petitioner has admitted in paragraph 3 of the plaint that the said shed is on CTS No.115, no case is therefore made out under Order 26 Rule 9 of the C.P.C. for appointment of the Court Commissioner.

6. Though it is true that paragraph 3 of the plaint the Petitioner has averred that the said shed is on CTS No.115, it has also been stated in the said paragraph that on account of triangular nature of the said CTS No.115, there is overlapping on CTS No.114. The interpretation of the trial Court in so far as paragraph 3 is concerned, prima-facie does not appear to be well founded. In any event, even if the shed is entirely on CTS No.115, the same can be ascertained by the Court Commissioner and the report can be submitted to the Court. Ultimately, the provisions of Order 26 Rule 9 of the C.P.C. are in aid of finally settling the disputes between the parties. Mr.Soni relies upon

the judgment in the case of - *Payani Achuthan vs. Chamballikundu Harijan Fisheries Development Co-operative Society and Ors., AIR 1996 Kerala, 276.* The said judgment inter-alia lays down a proposition that refusal to appoint a Court Commissioner under Order 26 Rule 9 of the C.P.C. to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it.

7. In my view, it is a case where the report of the Court Commissioner would aid the Court in deciding the disputes between the parties. In that view of the matter, the impugned order dated 5.8.2005 is set-aside. The application Exhibit 41 is consequently allowed. Both the parties are agreeable that the concerned T.I.L.R. who has jurisdiction over the area in question should be appointed as a Court Commissioner. The Petitioner also agrees to pay the costs of the Commissioner. The T.I.L.R. to intimate the parties the date of inspection at the site in question. The Commission to be completed within three weeks of the receipt of this order. The Municipal Council, Jejuri would be entitled to be represented by its officer on the said date. Rule is accordingly in the aforesaid terms made absolute with parties to bear their own costs.

. Parties to act upon a copy duly authenticated by the Sheristedar of the Court.

(R.M. SAVANT, J.)